

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 02-05
(September 12, 2002)

**Disqualification Concerns When the Attorney
General's Office Represents Judges**

Issues

1. Must judges who are represented by the Attorney General's Office in litigation brought against them in a professional capacity disqualify themselves in every case in which the lawyers representing them appear?

Answer: Yes, with one special exception.

2. Must the same judges disqualify themselves in all cases in which lawyers from the Attorney General's Office appear?

Answer: No.

Facts

Judges are sometimes named as defendants in litigation as a result of their judicial positions or activities. Examples include civil rights actions and lawsuits filed by disgruntled litigants. The Arizona Attorney General's Office typically represents judges in such proceedings. Not infrequently, judges have other cases pending before them in which the Attorney General's Office is counsel of record.

Discussion

Issue 1

Canon 3E of the Code of Judicial Conduct mandates disqualification "in a proceeding in which the judge's impartiality might reasonably be questioned" Under this provision a judge's impartiality might reasonably be questioned if he or she continued to preside over a matter in which the assistant attorney general who is currently representing the judge appears. A member of the public could well believe that the lawyer representing the judge carries enhanced esteem and approval by the court over and above that accorded to him or his attorney. *See also Reilly v. Southeastern Pa. Transp. Auth.*, 330 Pa. Super. 420, 479 A.2d 973, 432 (1984) ("[I]t is more likely to appear to a reasonable person that the judge's conduct of the trial might not be impartial when one of the attorneys is, even as the trial is being held, representing the judge.").

Once the litigation against the judge concludes, he or she should assess whether ongoing disqualification in cases involving the same assistant attorney general is necessary. Relevant considerations include the nature and extent of the prior litigation, whether the judge was personally involved in the matter as it progressed, and whether he or she shared any confidential information

Advisory Opinion 02-05

with the assistant attorney general that might give that attorney an advantage when appearing before him or her in the future. Barring such circumstances, however, disqualification would not ordinarily be required once the litigation has ended.

Finally, the committee notes that there may be circumstances under which disqualification is not required, even when the assistant attorney general representing the judge appears before him or her. For example, if the lawyer currently represents *all* judicial officers in the county or state (e.g., in a challenge to the entire court's authority or an attack on a judicial policy or rule), the "rule of necessity" may prevail, making disqualification impractical and unnecessary. *See, e.g.,* Shaman et al., *Judicial Conduct and Ethics* § 4.18; Abramson, *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct*, 8; *United States v. Will*, 449 U.S. 200 (1980).

It is beyond the scope of this opinion to address a judge's duties when his or her *personal* lawyer is at issue. Different considerations apply in that context because the appearance of bias is more pronounced. Moreover, the relationship will typically be one in which the judge affirmatively selected and retained the lawyer.

Issue 2

The appearance of partiality is significantly diminished when it is another member of the Attorney General's Office that appears before the judge. The Attorney General employs hundreds of attorneys. Absent actual bias, it is not necessary that the judge disqualify in all cases involving that office during the pendency of the representation. Other jurisdictions recognize this same distinction, requiring disqualification only when it is the judge's own lawyer who appears. *See, e.g.,* N. Y. Ops. 90-197 and 98-14; Wash. Op. 95-12; Nev. Op. 99-007. Nor does the committee deem it necessary for the judge to disclose the fact that he is being represented by the Attorney General's Office in every case in which a member of that office appears.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 3E and F (1993).

Other References

New York Advisory Committee on Judicial Ethics, Opinions 90-197 (1990); 98-14 (1998).

Nevada Standing Committee on Judicial Ethics and Election Practices, Opinion 99-007 (1999).

Washington State Ethics Advisory Committee, Opinion 95-12 (1995).

Leslie W. Abramson, *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct*, 8 (2d 1992).

Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics* § 4.18 (3d ed. 2000).

Reilly v. Southeastern Pennsylvania Transportation Authority, 330 Pa. Super. 420, 479 A.2d 973 (1984).

United States v. Will, 449 U.S. 200 (1980).